No. 80-411

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1980

HOWARD MORSEBURG,

Petitioner,

—vs.—

ANDRE BALYON and CALIFORNIA ARTS COUNCIL, an agency of the State of California,

Respondents,

—vs.—

RICHARD MAYER and PETER ALEXANDER,

Respondents in Intervention.

BRIEF FOR RESPONDENTS IN INTERVENTION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

By this action, petitioner seeks a declaration that the California Resale Royalties Act (hereinafter "Resale Royalties Act" or the "Act"), codified as California Civil Code Section 986, is an unconstitutional exercise of the power of the State of California.

Petitioner's Appendix sets forth only Section 1 of the Act. Section 2 of the Act, passed by the legislature but apparently codified in the form of a note to Section 1, provides that:

> "The rights of an artist of a work of fine art to receive payment of an amount equal to 5 percent of the amount of a sale of fine art within the provisions of Section 986 shall be vested at the time of such sale; except that an artist shall have no rights to any payment pursuant to this act, if any provision therein is subsequently repealed so as to remove the provisions for such payment, as to any sale which occurs subsequent to such repeal; and except that, in the event any provision in this act is otherwise subsequently amended or changed, an artist shall have only those rights to any payment pursuant to this act, as to any sale which occurs subsequent to such amendment or change."

On cross-motions for summary judgment, the United States District Court for the Central District of California upheld the Act's constitutionality [CR 239-247] and entered judgment in favor of defendants [CR 238]. The United States Court of Appeals for the Ninth Circuit affirmed. *Morseburg* v. *Balyon,* 621 F.2d 972 (1980).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CONCERNING FEDERAL PREEMPTION OF THE ACT WAS BASED UPON, AND IS ENTIRELY CONSISTENT WITH, THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the court of appeals below was based upon the decision of this Court in *Goldstein* v. *California,* 412 U.S. 546 (1973). The Court below stated that *Goldstein* "provided clear guidance with respect to the emphasis proper for this case," and it held that "*Goldstein* governs this case." 621 F.2d at 977. Under these circumstances, the petition should be denied unless petitioner can show that the decision of the court below is in conflict with the decision of this Court in *Goldstein.*

Petitioner argues that *Goldstein* is "ambiguous," and that this ambiguity "led the court of appeals below into the error of relying upon *Goldstein.*" Petition at 6. Petitioner also asserts that there is a "seeming contradiction" between *Goldstein* and the subsequent decision of this Court in *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974), and that this contradiction "calls for further clarification by this Court." Petition at 5, n. 1. But such ambiguity and contradiction lie solely in the eyes of petitioner, who would seek to rewrite the applicable decisions of this Court.

What *Goldstein* made perfectly clear is the following. First, the Copyright Clause of the Constitution does not vest exclusive control over copyright in the federal government. 412 U.S. at 558. Second, the Supremacy Clause of the Constitution does not prevent the states from acting with respect to works which may be the

subject of copyright where there is no conflict between state and federal law. 412 U.S. at 570. This analysis was reaffirmed and applied in *Kewanee.* 416 U.S. at 478-79.

The court of appeals below found that there is no conflict between the artist's right of first sale under Section 1(a) of the Copyright Act of 1909 and the artist's right to receive a royalty upon the second and subsequent resales of a work of art under Section 986(a) of the California Resale Royalties Act. 621 F.2d at 978. Applying *Goldstein,* the court below quite properly concluded that the California Act is a valid exercise of a power retained by the State of California under the Constitution and that it does not intrude into an area which Congress has preempted.

Petitioner has failed to show any conflict between the decision of the court below concerning federal preemption and the applicable decisions of this Court.

II. THE ACT DOES NOT OFFEND EITHER THE CONTRACTS CLAUSE OR THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

A. *The Contracts Clause*

With respect to petitioner's claim that the Act unconstitutionally impairs his rights of contract, the court of appeals below found that "a Contracts Clause issue lurks sufficiently close by to require discussion." 621 F.2d at 978. The court pointed out that:

> "The degree to which a state may impair the obligations of contract varies with the public need for the impairment. *Allied Structural Steel Co.* v. *Spannaus,* [438 U.S. 234, 241-43, (1978)]. An

> insignificant impairment does not need the extensive justification that otherwise might be necessary. *Id.* at 245. Moreover, we should defer to the state legislature's determination of the public need whenever possible. *United States Trust Co.* v. *New Jersey,* [431 U.S. 1, 22-23 (1977)]." 621 F.2d at 979.

It held that the Resale Royalties Act's imposition of a five percent royalty was simply not of sufficient magnitude to offend the Contracts Clause. *Id.*

We do not agree with the court of appeals that a Contracts Clause issue lurks even close by. The vast majority of cases adjudicated under the Contracts Clause decide rights related to bond or mortgage debts and other sorts of continuing contractual obligations. *See United States Trust Co.* v. *New Jersey, supra,* and *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 426 (1934), citing *Ogden* v. *Saunders,* 12 Wheat. 213, 354-355. Here, however, petitioner seeks to apply the Clause to the wholly discharged obligations of two executed sales contracts, and does so without citation to similar precedent. Such an extension of the Clause should not be recognized by this Court.

Upon either of the foregoing analyses, it is apparent that the Act does not offend the Contracts Clause of the Constitution.

B. ***The Due Process Clause***

The court of appeals below rejected petitioner's Due Process Clause argument because the retroactive burdens imposed by the Resale Royalties Act are not " 'so wholly unexpected and disruptive that harsh and oppresive consequences follow' " so as to give rise to constitutional concerns. 621 F.2d at 980.

However, we do not believe that there are any property rights affected by the Act. The resale royalty created by the Act is payable only where the artwork involved has appreciated in value. Both the appreciated value and profit from resale of a work of art are, at best, mere expectancies to the purchaser-reseller. At the time of the initial sale, the future value and profit from resale of the artwork are wholly inchoate, particularly in a speculative market. If they be property rights at all, they are so speculative that their status as such creates no impediment to their retroactive alteration by the legislature. *See Mercado e Hijos* v. *Feliciano,* 260 F.2d 500 (1st Cir. 1958) for such a characterization of the possibility of reversion in real property.

Upon either of the foregoing analyses, it is apparent that the Act does not offend the Due Process Clause of the Constitution.

CONCLUSION

In upholding the constitutionality of the California Resale Royalties Act, the district court below said that:

> "Not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage. The California legislature has evidently felt that a need exists to offer further encouragement to and economic protection of artists. That is a decision which the courts shall not lightly reverse. An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and vital community of artists. The California Resale Royal-

ties Act may be a small positive step in such a direction [CR 244: 6-9]."

Both the district court and the court of appeals below found that the Act passes constitutional muster with flying colors. Petitioner has failed to show that their opinions are unsound or that their decisions are in conflict with those of this Court or of another court of appeals. The petition should accordingly be denied.

Respectfully submitted,

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